



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R01-OAR-2019-0695; FRL- 10018-99-Region 1]

Air Plan Approval; Massachusetts; Infrastructure State Implementation Plan Requirements for the 2015 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) submission by the Commonwealth of Massachusetts. Except as noted below, this submission satisfies the infrastructure requirements of the Clean Air Act (CAA) for the 2015 ozone National Ambient Air Quality Standards (NAAQS). The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA. We are issuing a finding of failure to submit pertaining to the various aspects of infrastructure SIPs relating to the prevention of significant deterioration (PSD). The Commonwealth has long been subject to a Federal Implementation Plan (FIP) regarding PSD, thus the finding of failure to submit will result in no sanctions or further FIP requirements. In this action we do not address CAA section 110(a)(2)(D)(i)(I) requirements regarding interstate transport, because we previously approved the Commonwealth's submission addressing these requirements for the 2015 ozone standard. This action is being taken in accordance with the Clean Air Act.

DATES: This rule is effective on **[Insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R01-OAR-2019-0695. All documents in the docket are listed on the <https://www.regulations.gov>

web site. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available at <https://www.regulations.gov> or at the U.S.

Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5

Post Office Square - Suite 100, Boston, MA. EPA requests that if at all possible, you contact the

contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your

inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m.

to 4:30 p.m., excluding legal holidays and facility closures due to COVID-19.

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SUPPLEMENTARY INFORMATION: Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

Table of Contents

I. Background and Purpose

II. Response to Comments

III. Final Action

IV. Statutory and Executive Order Reviews

I. Background and Purpose

On March 13, 2020, EPA published a notice of proposed rulemaking (NPRM) (85 FR 14605) proposing to approve and a direct final rule (DFR) (85 FR 14578) approving a SIP submission from the Commonwealth of Massachusetts to address the infrastructure requirements of the Clean Air Act for the 2015 ozone NAAQS. When EPA promulgates a new or revised NAAQS, each state

must submit a SIP submission, known as an “infrastructure SIP”, in order to ensure that the state’s SIP provides for implementation, maintenance, and enforcement of the new or revised NAAQS. The Massachusetts Department of Environmental Protection (MassDEP) submitted the infrastructure SIP submission to EPA as a formal SIP submission on September 27, 2018. In the DFR, EPA stated that, if it received an adverse comment on the direct final proposal by April 13, 2020, then the agency would withdraw that direct final and issue a final rule based on the NPRM. EPA received one adverse comment prior to the close of the comment period. Therefore, EPA withdrew the DFR on May 12, 2020 (85 FR 27927). This action is a final rule based on the NPRM.

A detailed discussion of the Massachusetts September 27, 2018, infrastructure SIP submission, and EPA’s rationale for proposing approval of the SIP submission appear in the DFR and we will not restate that here, except to the extent relevant to our response to the public comment on the proposal. EPA also received two requests to extend the public comment period for the NPRM until after the COVID-19 pandemic is over. EPA is denying these extension requests, and the reasons for this denial can be found in the docket for this rulemaking.

II. Response to Comment

EPA received one adverse comment on the March 13, 2020, notice of proposed rulemaking.

Comment: “EPA is also approving the state's SIP as having adequate resources, how was EPA able to identify whether the state had adequate resources before the COVID-19 outbreak and how can the outbreak not affect the state's ability to continue having adequate resources? And how is EPA sure the state has adequate enforcement abilities to carry out its mission to protect environmental and human health after Trump's EPA issued a BLANKET waiver to all environmental rules??? EPA can't possibly think a state is able to enforce the state's rules in addition to EPA's rules that Trump has declined to persecute [sic]. EPA can't approve the state's ability to have adequate resources or adequate funding or adequate enforcement if EPA's review is predicated on the belief of pre-COVID-19 conditions will continue now.”

Response: The comment provides little detail, but it appears to raise three general issues. First, it asks how EPA was “able to identify whether the state had adequate resources” before the COVID-19 pandemic. Second, it questions any conclusion that Massachusetts has “adequate resources” and “adequate enforcement abilities” in light of the pandemic. And third, it asks how EPA can be sure that Massachusetts has “adequate enforcement abilities” in light of what the comment refers to as an EPA-issued “BLANKET waiver to all environmental rules.” On the third issue, the comment does not specifically identify an EPA “waiver,” but EPA assumes the commenter refers to EPA’s March 26, 2020, memorandum entitled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program” (hereinafter, “March 2020 memorandum” or “EPA Enforcement Memo”). The comment does not identify a particular section (or sections) of the Clean Air Act that it believes Massachusetts failed to satisfy but it is reasonable to assume that the commenter is referring to the requirements of sections 110(a)(2)(C) (pertaining to enforcement) and section 110(a)(2)(E) (pertaining to state resources).

As an initial matter, the purpose of an infrastructure SIP submission is to demonstrate that the state’s SIP contains the basic program elements needed to implement, maintain, and enforce the particular NAAQS at issue, in this case, the 2015 ozone NAAQS. If the current SIP fails to satisfy these basic program elements then the state should revise the existing SIP so that EPA may evaluate these elements and approve them into the SIP, as appropriate. A SIP is generally comprised of state regulations, statutes and other documents used by the state that the EPA has approved as meeting applicable CAA requirements. In the context of acting on infrastructure SIP submissions, EPA evaluates the state’s SIP submission to determine whether the submission meets the applicable statutory requirements of CAA sections 110(a)(1) and 110(a)(2) and the appropriate regulatory requirements. EPA is not evaluating the state’s implementation of its SIP in this action. *See Montana Env’tl. Info. Ctr. v. Thomas*, 902 F.3d 971 (9th Cir. 2018). EPA has other authority to address issues concerning a state’s implementation of the rules, regulations, consent orders, etc. that comprise its SIP.

EPA disagrees that it should disapprove the infrastructure SIP submission for the “enforcement” sub-element of CAA section 110(a)(2)(C), the “adequate resources” requirement in CAA section 110(a)(2)(E)(i), or both. Section 110(a)(2)(E)(i) of the Act requires each SIP to provide “necessary assurances that the State . . . will have adequate personnel, funding, and authority under State . . . law to carry out such implementation plan.” Thus, under this section, EPA evaluates a state's infrastructure SIP submission for evidence that the state has provided necessary assurances that it has adequate resources to carry out the SIP. Element E does not require the EPA to conduct an audit of state resources or personnel. Nevertheless, upon receiving this comment, EPA requested supplemental information from MassDEP to provide more detail about Department staff and resources. In this supplemental document, MassDEP states, “MassDEP resources to implement the SIP include staff and managers in the Bureau of Air and Waste (BAW), including the Division of Air and Climate Programs in MassDEP’s Boston office (approximately 29 staff), the Air Assessment Branch based in MassDEP’s Wall Experiment Station laboratory in Lawrence (approximately 23 staff), and the permitting and compliance and enforcement (C&E) units in each of the four MassDEP regional offices (approximately 55 staff).” MassDEP further notes that these numbers do not include additional staff in the separate legal, research, and information technology units that also support the Commonwealth’s efforts carrying out the SIP.

MassDEP staff and operations are funded by the Commonwealth and through EPA grants, including annual funding through CAA sections 103 and 105 to assist with the costs of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards. Massachusetts also has an EPA-approved fee program under CAA title V which is used to support title V program elements such as permitting, monitoring, testing, inspections, and enforcement. MassDEP’s budget has been consistent over the past number of years and over these years Massachusetts has been able to meet

its statutory commitments under the Act.¹ MassDEP also reports that “There are no plans that would significantly alter these resources in the 5-year period following submission of the Certification or beyond and therefore MassDEP expects to have adequate resources to implement the SIP in the future.” The full supplemental submission from MassDEP can be found in the docket for this rulemaking.

EPA explained in the DFR that Massachusetts’ infrastructure SIP submission documented that its air agency, MassDEP, has the requisite authority and resources to carry out its SIP obligations. In particular, Massachusetts General Laws c. 111, sections 142A to 142N, provide MassDEP with the authority to carry out the state’s implementation plan. The Massachusetts SIP, as originally submitted in 1971 and subsequently amended, provides descriptions of the staffing and funding necessary to carry out the plan. In the original and supplemental submissions MassDEP has provided an adequate description of its resources to allow EPA to assess that MassDEP has adequate personnel and funding to carry out the SIP during the five years following infrastructure SIP submission and in future years. Thus, with respect to the first issue raised by the comment, EPA finds that MassDEP has provided an adequate description of its staffing resources and that this information, when considered together with the budget information, is sufficient for EPA to conclude that the Commonwealth has adequate personnel, funding, and authority under State law to meet its SIP obligations sufficient to justify approval of the SIP submittal for section 110(a)(2)(E)(i).

With respect to the second issue, the commenter expresses concern that the impacts of the ongoing COVID 19 pandemic can only result in the Commonwealth having inadequate resources to meet its SIP obligations. As explained above, MassDEP provides assurances in the infrastructure SIP submission and supplemental document that it has adequate personnel and funding to carry out the SIP during the five years following the submission and in future years. We also note that the

¹ <https://budget.digital.mass.gov/summary/fy20/enacted/energy-and-environmental-affairs/environmental-protection/?tab=historical-spending>

Massachusetts' Governor's 2021 budget recommendation proposes a similar level of funding for MassDEP as it has received in recent years.² Moreover, the Commonwealth receives federal grants under CAA sections 103 and 105 to assist it in carrying out the SIP, and other funding sources include permit fees and title V fees collected by MassDEP. If the Commonwealth's implementation of its SIP is substantially affected in the future by the pandemic, EPA has the statutory authority under the CAA to address such issues through means other than disapproving the infrastructure SIP submission at this time. Based on the original SIP submission and supplemental information, EPA finds that MassDEP has provided necessary information for EPA to conclude that MassDEP has and will continue to have adequate personnel and funding to carry out the SIP. For these reasons, EPA does not agree that it must disapprove the infrastructure SIP submission for section 110(a)(2)(E)(i) in light of the pandemic.

Also, with respect to the second issue raised, the comment also expresses concern that the Commonwealth will not have "adequate enforcement abilities" in light of the pandemic. While the commenter does not identify any particular infrastructure SIP requirement with this claim, it is possible that the commenter may be objecting to EPA's approval of the ISIP submittal for the enforcement sub-element of section 110(a)(2)(C). This sub-element requires that each state's SIP "include a program to provide for the enforcement of" the emission limits and control measures that the state air agency identified in its submission for purposes of satisfying 110(a)(2)(A). In the DFR, EPA explained that the Massachusetts SIP includes such a program. In particular, EPA noted specific provisions of state law that authorize MassDEP to adopt regulations to control air pollution, to enforce such regulations and to assess penalties for non-compliance. EPA also highlighted state regulations currently in the SIP. Thus, EPA explained that the SIP includes a program to provide for the enforcement of SIP measures. EPA acknowledges the COVID-19 pandemic has the potential to impact the resources available to the state to maintain its program;

² <https://budget.digital.mass.gov/govbudget/fy21/appropriations/energy-and-environmental-affairs/environmental-protection?tab=budget-summary>

however, proposed level funding for FY2021 indicates that MADEP will maintain their current program capability. EPA also notes that The Commonwealth has been a leader among all states in being proactive to address air quality concerns. Nevertheless, if an actual resources problem were to develop, EPA has the statutory authority to address such issues through means other than disapproving the infrastructure SIP submission at this time.

Finally, the commenter expresses concern that Massachusetts does not have “adequate enforcement abilities” in light of what the commenter characterizes as a “blanket waiver” by EPA of environmental rules. EPA does not agree that the March 2020 memorandum is a “blanket waiver,”³ but in any event the memorandum applies to EPA’s own enforcement activities, not a state’s. *See* EPA Enforcement Memo at 1-2 (“Authorized states or tribes may take a different approach under their own authorities.”). Therefore, it does not affect whether Massachusetts has “adequate enforcement abilities” and does not affect Massachusetts’ “program to provide for the enforcement of” SIP measures. Furthermore, on August 31, 2020, EPA terminated the temporary policy described in the March 2020 memorandum. *See COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program: Addendum on Termination*, EPA (June 29, 2020). For these reasons, the March 2020 memorandum is not a reason to disapprove the Massachusetts’ ISIP submittal for the enforcement sub-element in section 110(a)(2)(C).

For the above reasons, EPA concludes that the comment does not justify disapproving the Commonwealth’s infrastructure SIP submittal for the 2015 ozone NAAQS for compliance with the requirements of CAA sections 110(a)(2)(C) or (E)(i).

III. Final Action

EPA is approving most portions of the Massachusetts infrastructure SIP submission for the 2015 ozone NAAQS. We are also issuing a finding of failure to submit pertaining to the various

³ For instance, the memorandum does not apply to criminal violations, imports, or activities that are carried out under Superfund and RCRA Corrective Action enforcement instruments. EPA Enforcement Memo at 2. Moreover, the enforcement discretion set forth in the memorandum is temporary and is conditioned on regulated entities making every effort to comply with their environmental compliance obligations. *Id.*

infrastructure SIP requirements that pertain to the prevention of significant deterioration (PSD) program, i.e., section 110(a)(2)(C) sub-element 2, the PSD portion of Sub-Element 2: section 110(a)(2)(D)(i)(II)—PSD (Prong 3), section 110(a)(2)(D)(ii) with respect to the PSD-related notice of interstate pollution, section 110(a)(2)(J) sub-element 1 with respect to the FLM consultation requirement for PSD permitting, and section 110(a)(2)(J) sub-element 3 (PSD). The Commonwealth has long been subject to a Federal Implementation Plan (FIP) regarding PSD, thus the finding of failure to submit will result in no mandatory sanctions or further FIP requirements. This rulemaking also does not include any action on the interstate transport portion of the Commonwealth's infrastructure SIP submission for the 2015 Ozone NAAQS, i.e., section 110(a)(2)(D). This action is being taken in accordance with the Clean Air Act.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will

submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: February 3, 2021.

Deborah Szaro,
Acting Regional Administrator,
EPA Region 1.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart W - Massachusetts

2. In § 52.1120(e), amend the table by adding an entry for “Infrastructure SIP submittal for 2015 Ozone NAAQS” at the end of the table to read as follows:

§ 52.1120 Identification of plan.

* * * * *

(e) * * *

Massachusetts Non Regulatory

Name of non regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approved date ³	Explanations
**	*	*	*	**
Infrastructure SIP submittal for 2015 Ozone NAAQS	Statewide	September 27, 2018	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	Approved with respect to requirements for CAA section 110(a)(2) (A), (B), (C), (D), (E), (F), (G), (H), (J), (K), (L), and (M) with the exception of the PSD-related requirements of (C), (D), and (J).

³ To determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision
[FR Doc. 2021-02536 Filed: 2/8/2021 8:45 am; Publication Date: 2/9/2021]